



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 18-045

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

1. Statutory Authority

The proposed rule does not appear to meet the standard that is required to submit a petition under s. 227.26 (4), Stats., for the expedited repeal of an unauthorized rule. An “unauthorized rule” is a rule for which an agency lacks the authority to promulgate the rule due to the repeal or amendment of the law that previously authorized its promulgation.

The department accurately describes s. 51.30 (4) (cg), Stats., created by 2017 Wisconsin Act 252, which authorizes the limited release of treatment records of foster children to out-of-home care providers and child welfare agencies. Additionally, the department identifies ss. DHS 92.06 (1) and 94.17, as current code provisions relating to release of treatment records. The proposed petition modifies and simplifies these code provisions to account for the expansion of record release created by the Act.

However, the process for expedited repeal of unauthorized rules under s. 227.26 (4), Stats., may not be invoked unless a statutory change creates a situation where the agency lacks authority to promulgate a rule. The department does not reference any changes to its statutory authority to promulgate s. DHS 92.06 (1) or 94.17, and it appears that no such changes have been made by the Legislature. In fact, it appears that if the Act made any changes to the department’s authority relating to release of records, it *expanded* the department’s authority as the Act permits certain records to be released to new entities.

It appears that the changes proposed by the department in its petition are not driven by a change in agency statutory authority, but rather by the department’s desire to update its Administrative Code to improve clarity and better comport with the statutes without going through

the regular rulemaking process. Therefore, it does not appear that the department “lacks the authority” to promulgate the rule as required by s. 227.26 (4), Stats.

2. Form, Style and Placement in Administrative Code

a. An introductory clause should be inserted to specifically enumerate the rule provisions treated and to state the subject matter of the proposed rule. [s. 1.02 (1), Manual.]

b. The rule summary’s listing of statutes interpreted should be revised to cite the specific statutory provision that was interpreted for administration and enforcement in the department’s original rule. [s. 1.02 (2m) (a) and (b), Manual.]

c. The rule summary’s listing of statutory authority should be revised to cite the specific statutory provision that granted rulemaking authority for the original rule. The statutory provision for the expedited rulemaking process, s. 227.26 (4), Stats., should not be cited, as that provision establishes the process and does not remove or confer rulemaking authority for the subject matter addressed in the proposed rule. [s. 1.02 (2m) (a), Manual.]

d. The rule summary’s explanation of agency authority should be updated to reflect any revisions made in accordance with the previous comment.

e. The rule summary’s listing of related statutes or rules should be revised to identify any statutes or rules that relate to the subject matter addressed in the proposed rule.